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No. 84-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,
Appellants,

v.

GOULD, INC., a Delaware corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts Wisconsin statutory provisions that prohibit the State from purchasing products of certain recidivist violators of the National Labor Relations Act.

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Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellants.*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The court of appeals held that the National Labor Relations Act ("NLRA") preempts state law prohibiting the state of Wisconsin from purchasing products of certain recidivist violators of the NLRA. The effect of this decision is to undermine the traditional functions and activities of state and local governments within our federal system in at least two respects. First, state and local governments historically have not only regulated markets but also have participated in markets. In so participating, state and local governments have traditionally imposed reasonable requirements on contractors that do business with them. The content of such requirements, so long as it does not conflict with the Constitution or with applicable federal law, has been left to the government entity to decide in light of its own democratic experience and market exigencies at the time. The court of appeals, however, has substituted its view of an acceptable requirement for that of the state of Wisconsin.

Second, it is an essential ingredient to the operational success of our federal system that state and local governments develop and implement policy positions consistent with federal policy choices, statutes, and programs. The Wisconsin statutory provisions at issue in this case are fully consistent with and dependent upon the execution of federal policy by federal organs. Rather than endorse this cooperative model of federal-state relations, the court

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* Appellants have consented to the filing of this brief. Appellee has not.

of appeals dismantled it on the insubstantial ground that Wisconsin, in effect, too faithfully endorses federal policy by subjecting recidivist NLRA violators to restrictions in their market dealings with the state.

In our democratic system, accommodation of federal and state policies ought not to be subjected to wooden judicial analyses that aim unnecessarily to undermine reasonable market choices of state and local governments. The *amici* are concerned that the decision of the court of appeals, if affirmed by this Court, will encroach upon the legitimate role of state and local governments as market participants and will signal an unjustified hostility to other state and local policy decisions that are fully consistent with federal policy. Thus the *amici* submit this brief to assist the Court in resolution of the preemption issue raised in this case.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The interest of the *amici* is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

In 1979, the State of Wisconsin enacted legislation, effective May 21, 1980, requiring the State's Department of Industry, Labor and Human Relations to maintain a

list of persons or firms that have been found by the National Labor Relations Board ("NLRB") and by federal courts to have committed three separate violations of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-167 (1982), or to be in contempt for failing to correct three different NLRA violations within a five-year period. Wis. Stat. Ann. § 101.245(1) (West Supp. 1984). The name of such a person or firm shall remain on the list for three years. Wis. Stat. Ann. § 101.245(4) (West Supp. 1984). The significance of the list is that Wisconsin's Department of Administration is prohibited from purchasing any product known to be manufactured or sold by any person or firm included on the list. Wis. Stat. Ann. § 16.75(8) (West Supp. 1984). As cogently stated by appellants ("Wisconsin") in their jurisdictional statement, "Wisconsin chooses not to do business with recidivist labor law violators." (Juris. Statement at 10.)[1]

Appellee Gould, Inc. ("Gould"), a Delaware corporation with its principal place of business in Illinois, was added to the list in August 1982. Gould has not disputed that it met the statutory requirements for inclusion on the list. At that time, Gould had existing contracts with Wisconsin to provide goods and services in excess of ten thousand dollars, and apparently harbored expectations that it could bid for and would be awarded additional such contracts in the future. Wisconsin advised Gould, in

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[1] The Wisconsin statutory provisions are reproduced in the Appendix hereto. Other states have passed similar legislation barring the awarding of state contracts to employers found by a federal court of appeals to have violated the NLRA. *See* Conn. Gen. Stat. § 31-57a (1985) (three time violators); Md. Ann. Code art. 21, § 3-404 (1981) (one time violators); Mich. Comp. Laws Ann. § 423.322-324 (West Supp. 1985) (three time violators); Ohio Rev. Code Ann. § 121.23 (Page 1984) (two time violators); *cf.* Me. Rev. Stat. Ann. tit. 26, § 1402 (Supp. 1984) (willful or repeated OSHA violators).

light of its inclusion on the list, that the existing contracts would be cancelled if that could be done without penalty and that it would be debarred from doing business with the state until July 1, 1985.

In a district court suit commenced in February 1983, Gould challenged the state's actions on a number of grounds, including violations of the preemption doctrine and of the due process and equal protection clauses of the fourteenth amendment. After granting a preliminary injunction, the United States District Court for the Western District of Wisconsin held that the Wisconsin statutory provisions were preempted by the NLRA. The court permanently enjoined Wisconsin from debarring Gould from doing business with the state, from refusing to purchase its goods, and from including Gould on the list of recidivist labor law violators. 576 F.Supp. 1290, 1299 (W.D. Wis. 1983). In addition, the district court held that Gould's fourteenth amendment claims alleging violations of due process and equal protection, while not otherwise meritorious, were sufficient to ground federal jurisdiction and an award of attorney's fees even though Gould had prevailed only on its preemption claim.

The court of appeals affirmed the district court's preemption holding but reversed the award of attorney's fees. 750 F.2d 608 (7th Cir. 1984). The preemption question alone is before this Court. In finding preemption, the court of appeals was persuaded that the thrust of the Wisconsin statute was punitive while the NLRA itself was clearly remedial in nature. State interference with the federal scheme, therefore, could be inferred. *Id.* at 611. The court of appeals saw no merit in Wisconsin's contention that its actions were permissible because it was acting only as a market participant, not as a market regulator. In addition, the court of appeals distinguished this Court's cases upholding actions by a state resulting from market participation, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), as involving "dormant" commerce clause sit-

uations. 750 F.2d at 613. Here, by contrast, "Congress has legislated decisively in the area." *Id.*

SUMMARY OF ARGUMENT

I. Wisconsin was not properly subjected to preemption analysis because it was acting as a market participant when it enacted these contracting requirements. The commerce clause is directed against certain state regulation of interstate commerce. Commerce clause preemption analysis, therefore, applies only when a state is acting as a market regulator. It does not apply when a state acts as a participant in the market. *E.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

This market participant/market regulator distinction is not limited to "dormant" commerce clause cases. The language of the market participant cases indicates no such limitation. In fact, applying the market participant doctrine in this case is entirely consistent with the purposes of both the commerce clause itself and the NLRA, which was enacted under Congress' commerce clause authority. Each was intended to restrict the states' ability to *regulate* in certain areas of national concern. When states *participate* in a market, Congress may still regulate their conduct, but only to the extent to which it regulates private market participants. Congress has not regulated the states' contracting power at issue in this case. It has not told market participants that they must deal with recidivist NLRA violators.

Wisconsin clearly acted as a market participant when it enacted these statutes. It merely decided how and where it would allocate scarce state funds. In allocating these funds, Wisconsin took policy considerations into account along with purely economic considerations. One of these policy considerations is a judgment by the elected representatives of the people of Wisconsin that the state should not aid labor law violators. Identifying labor law violators, however, is left entirely up to the federal regu-

latory system. There is absolutely no interference with the federal regulatory scheme.

II. Even if the state was acting as a market regulator, this regulation is not preempted by the NLRA. A reexamination of the holding in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in light of its facts, the purpose of the NLRA, and subsequent cases makes this result clear.

A. *Garmon* itself preserves a place for state regulation. *Garmon* involved picketing, an activity that is at the heart of the federal scheme of labor regulation. The NLRA was intended to regulate such "vital, economic instruments" of labor-management relations, 359 U.S. at 241, and to do so in a manner that produces a uniform national regulatory scheme. Only regulations that confound national labor policy or interfere with the NLRB's uniform administration of that policy are preempted. Wisconsin's statutes do neither. They are entirely consistent with national labor policy, and in fact are dependent upon NLRB actions for their operation. They present no threat to national labor policy and involve no duplication of proceedings between the state and the NLRB.

B. Subsequent cases confirm this understanding of *Garmon*. Cases finding preemption involved regulations that were either inconsistent with the policies of the NLRA or that might undermine the uniform regulatory scheme set up by the NLRA. In contrast, in cases involving regulations that did not confound national labor policy or interfere with the regulatory scheme set up to implement that policy, no preemption was found. Such regulations present no threat to the uniform national labor policy established by the NLRA. Wisconsin's statutes closely resemble the regulations upheld in the cases where no preemption was found. They are entirely consistent with the NLRA's policies. Wisconsin's statutes, furthermore, do not regulate labor disputes. They leave the job of regulating the conduct of management and labor to the NLRB.

C. The court of appeals incorrectly applied the *Garmon* doctrine. In this case, the state and federal policies are consistent. The regulatory scheme implemented by the NLRA is also unaffected. No alternative procedures or remedies are provided. The state acts out of a strong local interest—allocating its revenue—and not out of a desire to punish recidivist labor law violators.

ARGUMENT

I. Preemption Analysis Was Not Appropriate in This Case.

Wisconsin has chosen to impose certain requirements on those with whom it does business.[2] For example, state specifications favor goods manufactured in Wisconsin wherever possible, Wis. Stat. Ann. § 16.75(1) (West Supp. 1984), and state contractors must report to the state on any subcontracts awarded to minority businesses. *Id.* § 16.75(3m)(c). Those who would contract with Wisconsin are also expected to achieve a modest level of compliance with the labor laws of the United States, or else they may be debarred from doing business with Wisconsin for three years. Wis. Stat. Ann. §§ 16.75(8), 101.245 (West Supp. 1984).[3] The court of appeals held that the

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[2] Wisconsin is not alone in forbidding its agencies from contracting with certain persons or purchasing certain products. States commonly impose restrictions on state spending where the expenditure would violate state policy. *See, e.g.*, Iowa Code Ann. § 73.3 (West Supp. 1985) (establishing mandatory preference for Iowa labor in all state employment and contracting); N.Y. State Fin. Law § 139-a (McKinney 1974) (disqualifying persons or firms from contracting with the State for five years upon refusal to testify, sign a waiver of immunity against criminal prosecution, or answer any relevant question, in an investigation concerning any transaction or contract with the State); 73 Pa. Cons. Stat. Ann. § 1884 (Purdon Supp. 1985) (requiring contractors entering into public works contracts to use domestically produced steel).

[3] States frequently use articulated federal policies as touchstones for state policies. *See, e.g.*, Mich. Comp. Laws Ann. § 487.358 (West

latter requirement is preempted by the NLRA. There can be no preemption here, however, because Wisconsin was not regulating commerce when it acted. It was merely exercising its prerogative as a buyer of goods to choose with whom and on what terms it will deal.[4] *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980). Wisconsin was a market participant.

This Court has employed market participant analysis to distinguish between acts taken by a state as a *regulator* of interstate commerce and those it takes as a *participant* in interstate commerce. If the state is a market participant, the strictures imposed by the commerce clause do not apply. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).[5] The

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Supp. 1985) (making FDIC coverage a "condition precedent" to approving articles of incorporation of Michigan banks); N.J. Stat. Ann. § 24:2-1 (West Supp. 1985) (authorizing State Department of Health to adopt federal regulations promulgated under the Federal Food, Drug, and Cosmetic Act); 35 Pa. Cons. Stat. Ann. § 780-133 (Purdon 1977) (food and drugs not deemed adulterated if they comply with the applicable federal act).

[4] Of course, this "prerogative" is not absolute. A state would be hard-pressed, for example, to square preferences for contractors of the white race with the fourteenth amendment. On the other hand, in the absence of a direct constitutional imperative ("nor shall any State deprive any person . . . ." U.S. Const. amend. XIV) or direct congressional regulation of a state's market participation, such participation is not restrained by federal authorities. No such constitutional imperative or congressional regulation is present in this case.

[5] In *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), the Court reiterated its support for the market participant doctrine but found that, under the facts of that case, Alaska was a market regulator rather than a market participant. Unlike typical sellers of goods, the state of Alaska imposed downstream requirements on purchasers of timber—a clearly regulatory action. *Id.* at 2244 (plurality opinion). *See* note 9 *infra*.

court of appeals refused to apply these precedents to the instant case; it maintained that these cases apply only to "dormant Commerce Clause" situations. 750 F.2d at 613. Upon examination of the reasoning behind these precedents in light of the purposes of the commerce clause and the NLRA, it will become clear that these cases do in fact apply to "active" as well as "dormant" commerce clause situations.[6]

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[6] The preemption issue involved in this case is but one species of the general doctrine of preemption. This doctrine derives from the structure of the nation itself. The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, establishes the basic principle that the laws and Constitution of the United States are superior to those of the states. Where the Constitution has given power over an area exclusively to the federal government, the states cannot act in this area even when the federal government does not act. Also, where both the states and the federal government have authority to act, an action by the federal government preempts conflicting state action. Furthermore, where Congress does act through a plenary grant of power, it can legislatively "occupy the field" and prohibit any state regulation in the particular area, even regulation consistent with the federal law. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down state alien registration legislation).

Each of these types of preemption is encountered in commerce clause jurisprudence. The grant to Congress of power to regulate interstate commerce has been interpreted to place limits on the powers of the states, even where Congress has not acted. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In these "dormant" commerce clause cases, a state regulation of commerce can be preempted by federal authority, but only if it places an impermissible burden on interstate commerce. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

Where Congress has acted to regulate commerce, the states' sphere of permissible action is much smaller. Of course, any state regulation of commerce that directly conflicts with a federal regulatory statute is preempted. Furthermore, where the application of a state law would frustrate the purposes of the federal act in question, it is also preempted. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766 (1945); *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 104 S. Ct. 2610 (1984). Yet, this "active commerce clause"

This Court first applied the market participant analysis in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In that case, the court upheld against a commerce clause challenge a Maryland program of paying, under some circumstances, a bounty for recycling Maryland-titled cars only to Maryland scrap processors. The Court distinguished *Alexandria Scrap* from other cases in which the commerce clause had been invoked to strike down state regulation of commerce:

> The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.

Id. at 806.

The Court then examined the purposes of the commerce clause, which was "designed in part to prevent trade barriers" that had harmed the unity of the states under the Articles of Confederation. *Id.* at 807. It concluded that

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preemption also leaves some room for state regulation. There is, however, a "narrow ambit of decisions in which [the] Court has indicated that Congressional legislation so occupied the field of a particular subject area that state regulation within that field would be improper no matter how well state law comported with the federal policies involved." *Hayfield N. R.R. Co.*, 104 S.Ct. at 2617 (citations omitted). Because such preemption leaves states with *no* freedom to act and is such a powerful assertion of federal power over the states, the Court is reluctant to infer such preemption. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). It will infer such complete preemption only if the nature of the subject matter permits no other conclusion or Congress has "unmistakably so ordained." *Hayfield N. R.R. Co.*, 104 S.Ct. at 2617 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

"[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. The Court stated in a footnote that its inclusion of the phrase "in the absence of congressional action" implied no view on whether Congress could prohibit the action taken by Maryland. *Id.* at 810 n.19. The Court thus sought to avoid precluding a role for Congress to *regulate* Maryland's market participation if it were so to choose. The Court, however, made no suggestion that, when a state is a market participant, congressional action would trigger a *preemption* result.

In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court upheld South Dakota's right to sell state-produced cement only to state residents. In doing so, the Court reaffirmed *Alexandria Scrap*, noting that the market participant/market regulator distinction "makes good sense and sound law." *Id.* at 436. Moreover, the Court's view of the purpose of the commerce clause suggests no active/dormant distinction. "There is *no indication* of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437 (emphasis added). Once again, the Court cautioned that, in the event of congressional action, the state may be "burdened with the same restrictions imposed on private market participants." *Id.* at 439. Yet there is no intimation that such *regulatory* enactments by Congress effect a *preemption* result.

The Court applied the same analysis in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), to uphold an order by the mayor of Boston directing that all city-financed or city-administered construction projects had to be performed by a workforce of at least fifty percent Boston residents. The Court cited *Alexandria Scrap* and *Reeves* for "the proposition that when a state or local government enters the

market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208. There is no limiting language to indicate that this principle applies only to dormant commerce clause cases.

Any reading of these cases that confines their precedential application to dormant commerce clause situations ignores this Court's express understanding of the purposes of the commerce clause.[7] The Court has stated that the commerce clause protects against burdensome state *regulation* of commerce. It is not directed at state *participation* in the flow of commerce. The NLRA, which was enacted pursuant to authority granted by the commerce clause, can have no greater effect. The NLRA preempts states from *regulating* in the sphere of management/labor relations. It does not, and does not purport to, regulate states when they participate in the flow of commerce as purchasers of goods.

This Court should not be, and has not been, quick to preempt state legislation. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). This is particularly true where the purposes of the state and federal acts in question are consistent, as in this case. *Id.* The market participant analysis is not a retreat from prior commerce clause doctrine. It is merely a recognition that, when states are acting as proprietors, they should be treated as proprietors under the commerce clause.[8] Consistent with the tenets of our federal system, Congress can surely regulate states' proprietary conduct,

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[7] Nor is *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), to the contrary. There, the Court reaffirmed the market participant analysis but found that Alaska was a market regulator, not a market participant. *See* note 9 *infra*.

[8] As stated in *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 725 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972), "[t]o subject every job specification to an *ad hoc* measurement of its effect on interstate commerce would unduly interfere with state proprietary functions if not bring them to a standstill."

but only to the same extent to which it regulates conduct of other proprietors. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). Congress simply has not chosen to regulate the states in respect to the contracting power at issue in this litigation.

Nor can it be gainsaid that Wisconsin was acting as a market participant, and not as a market regulator, in enacting the challenged laws. By imposing contractual conditions relating to the *bona fides* of state contractors, Wisconsin decided how and where it would spend its purchasing dollars. It did not tell employers what they must do in conducting their labor relations; that is the province of the federal labor laws as enforced by the NLRB and the courts. Wisconsin simply waited for the outcome of federal administrative and judicial proceedings under the NLRA and then, in light of its own democratic experience and understanding of market forces, exercised its inherent authority to determine its expenditures for itself. The state does not require employers to take any action. Contrary to the court of appeals' position, it imposes no penalty on recidivist labor law violators. Rather, recidivist labor law violators may simply take their business elsewhere. In short, the state is simply expressing the collective judgment of its people, through their elected representatives, that Wisconsin should do business only with individuals and firms that have shown respect for and compliance with the national labor policy.[9]

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[9] The contrast between Wisconsin's laws and those of Alaska at issue in *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), is striking. Wisconsin merely conditions its purchase of goods on the existence of a number of factors. *See* Wis. Stat. § 16.75 (1981). Purchasers typically impose contractual conditions relating to the *bona fides* of the seller. By contrast, as stated by this Court in *South-Central Timber*,

> it is clear that [Alaska] is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the

II. The NLRA Preempts State Law Only When the State Law Confounds the National Labor Policy or Interferes with the Regulatory Mechanism Established by the NLRA to Administer That Policy.

For nearly half a century, this Court has been asked to visit and revisit labor law preemption. In case after case since 1960, moreover, the Court has been requested by parties and *amici* alike to commence its analysis with an obligatory nod toward *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). This brief will not depart from the custom, except to the extent that it will emphasize that the Court should reexamine the holding of *Garmon* in light of the *actual* facts and reasoning in that case, the Court's subsequent decisions in the area, and the compelling need for the Court—in light of the original understanding of *Garmon* as well as later cases—to enunciate a clear principle that will serve as the touchstone for subsequent labor preemption analysis. It is submitted that such a reexamination indeed yields a clear principle, evident both in *Garmon* and in key subsequent cases, that mandates a reversal of the court of appeals' decision. Thus, even if this Court were to determine that the challenged Wisconsin statutes constituted market regulation rather than participation, it would have to side with Wisconsin in this appeal.

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obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

104 S.Ct. at 2245 (citation omitted). Although a seller normally has no right to sell to any particular buyer, whether it be to Wisconsin or a private concern, a buyer normally has a right to alienate itself of its newly acquired property as it alone sees fit. Alaska's transgression of the latter commercial practice made evident its regulatory mission. Wisconsin's challenged laws violate no similar commercial maxim, and in all respects constitute conventional action by a market participant.

A. *San Diego Building Trades Council v. Garmon* Clearly Preserves a Place for State Regulation.

In *Garmon*, which held that the NLRA preempted a challenged state action, this Court did not have before it a case in which a state had sought to regulate labor-management relations on the periphery of the federal scheme of regulation. Rather, *Garmon* involved an award of tort damages against unions for picketing an employer who had refused to hire only union members or those applying for union membership within thirty days. The case thus struck at the heart of the federal scheme for regulation of labor relations. As Justice Frankfurter stated for the Court, "[t]he case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act . . . [which] govern both protected 'concerted activities' and unfair labor practices." 359 U.S. at 241. These provisions, which "regulate the vital, economic instruments of the strike and the picket line," displace "variegated laws of the several States" and put in their place "a single, uniform, national rule." *Id.*[10]

In his opinion for the Court, Justice Frankfurter acknowledged the inherent ambiguities in labor law preemption analysis, but nevertheless underscored that "the unifying consideration of our decisions [is] the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [*i.e.*, the NLRB], armed with its own procedures, and

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[10] *See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1338 (1972) ("The crucial area in labor preemption is the law applicable to strikes and picketing."); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 277, 277-78 (1980) (federal labor law preemption focuses on activities arguably protected by NLRA § 7 or arguably prohibited by NLRA § 8 and on preserving the balance of power between labor and management established by the NLRA).

equipped with its specialized knowledge and cumulative experience." *Id.* at 242. To the *Garmon* Court, the NLRB's administration must be viewed broadly, so that, "[w]hen the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated policy of industrial relations, it [is] judicially necessary to preclude the States from acting." *Id.* at 243. By contrast, if the challenged state activity is a "merely peripheral concern" of the federal statutory scheme, (*id.*), or if it "touche[s] interests . . . deeply rooted in local feeling and responsibility," then, "in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244.

The import of Justice Frankfurter's reasoning is clear. The Court was concerned with state regulation that "threatened interference with the clearly indicated policy of industrial relations." *Id.* at 243. There is no doubt that the unions' behavior in *Garmon* constituted a colorable unfair labor practice, (*id.* at 245), subject, under the NLRA, to the "procedures, . . . specialized knowledge and cumulative experience" of the NLRB. *Id.* at 242. Under these circumstances, an *alternative* state damages remedy was simply at loggerheads with the core precept identified earlier in *Garmon*—entrusting administration of the nation's labor policy to the NLRB. *Id.* In short, only if the challenged state action confounds national labor policy or interferes with the NLRB's administration of that policy will it be preempted. The case makes equally clear, however, that state action will not otherwise be preempted, particularly if it reflects strong local feeling and responsibilities.

De Veau v. Braisted, 363 U.S. 144 (1960), decided one year after *Garmon*, supports this view. There, the Court sustained a provision of New York's Waterfront Commission Act that prohibited the collection of dues by a labor organization if any officer of the organization had

been convicted of a felony. The appellant urged that this provision was preempted by section 7 of the NLRA, 29 U.S.C. § 157, which unequivocally grants employees the right "to bargain through representatives of their own choosing," since it plainly interfered with employees' freedom of choice in the selection of their representatives. Rejecting this argument, the Court observed:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

Id. at 152. The Court concluded that Congress would not find in the state enactment "a true, real frustration" of its own labor policy. Because the Wisconsin law involved in this case compels a similar finding, and, moreover, vindicates a legitimate and compelling state interest, the preemption challenge must fail. *Id.* at 153.

Wisconsin has chosen not to do business with a certain class of recidivist NLRA violators. This policy choice is in line with the prevailing policies of the NLRA as articulated and applied by the NLRB, and there is no attempt to establish an alternative (even if consistent) remedy to those available through the NLRB. Indeed, Wisconsin's statutes are not only consistent with but also *dependent upon* NLRB actions. The challenged Wisconsin

statutes lead to *no* duplication of proceedings between the state and the NLRB; to *no* different findings of fact on the state and federal levels; to *no* tensions in timing or content between state and federal remedies; and to *no* departures from the national labor policy. *Garmon*, it should be recalled, "does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations." *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). A more harmonious coexistence than that evident in this case is difficult to imagine.

B. Subsequent Cases Confirm the Original Understanding of *Garmon*.

In other cases decided after *Garmon*, this Court has consistently focused on the considerations identified by Justice Frankfurter. In essence, the Court has been concerned with state activity that would confound the national labor policy or interfere with the regulatory mechanism established by the NLRA and thus undermine the uniform national application of the federal laws. The Court has repeatedly preempted concurrent state jurisdiction that would contravene this principle. In *Garmon* itself, for example, the state court awarded damages against a union for picketing activities associated with collective bargaining goals. Clearly, such concurrent jurisdiction could not be tolerated. As stated by this Court in *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983), the inquiry must focus on balancing "harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules" against the state interest involved.[11]

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[11] *See* Shultz & Husband, *Federal Preemption Under the NLRA: A Rule in Search of a Reason*, 62 Den. U.L. Rev. 531 (1985) (arguing for a rule that expressly balances state and federal interests when determining whether preemption is appropriate).

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), a union member who was suspended from the union for nonpayment of dues and consequently dismissed from employment under the collective bargaining agreement sued for damages and reinstatement. The state court based its holding of nonpreemption on the fact that Lockridge asserted a cause of action grounded in general contract law. Thus the court needed only to construe a contract and not the NLRA. This Court nevertheless held that the NLRA preempted this action. To allow such a claim would defeat the purpose of the NLRA and would raise the specter of conflicting state law interpretations rather than a uniform national determination on a matter basic to labor relations. *Id.* at 286-87.[12] In *Local 100, United Association of Journeymen v. Borden*, 373 U.S. 690 (1963), a union member's contract and tort claims against the union were held preempted because they encompassed "conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." *Id.* at 698. As a further example, in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), this Court held that a state commission's ruling on a union's refusal to work overtime during contract negotiations had been left deliberately by Congress to the control of market forces; the commission's ruling upset the collective bargaining scheme created by Congress. *Id.* at 149; *see id.* at 156 (Powell, J. and Burger, C.J., concurring) ("state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength" are not preempted).

Where the state or local interest involved does not confound national labor policy or interfere with the regula-

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[12] *See also Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985).

tory scheme designed to enforce that policy, however, no preemption of concurrent state jurisdiction has been found. The Court, for example, has upheld states' laws implementing their interests in protecting their citizens from libel even when the alleged defamatory statements arose from a labor dispute, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); from outrageous conduct inflicting emotional harm even when related to a labor controversy, *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977); and from the hardships of unemployment resulting from a strike called by the union, *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979). Wisconsin has a similar local interest in protecting its citizens from enriching, through their tax dollars, constant violators of the federal labor laws.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court found no preemption of a store owner's state trespass action against a union picket; the inquiry focused on whether "two *potentially conflicting* statutes were 'brought to bear on precisely the same conduct.'" *Id.* at 194 (emphasis added) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479 (1955)). Similarly, in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court refused to find preemption of replacement workers' post-strike claims against an employer because there would be no substantial impact on settlement of strikes, (*id.* at 505-06), or interference with the "Board's determination of matters within its jurisdiction." *Id.* at 511.

As recently as last Term, this Court was confronted with the argument that a state's imposition of a contractual term *on the collective bargaining agreement itself* was preempted by the NLRA, especially since the term constituted a mandatory subject of bargaining.

Metropolitan Life Insurance Co. v. Massachusetts, 105 S.Ct. 2380 (1985). The Court ruled that

> No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Id. at 2397. In the present case, the state legislation is indisputably compatible with the NLRA. Further, the contract at issue, unlike the collective bargaining agreement in *Metropolitan Life*, is at the periphery of the federal labor policy.

In articulating the boundaries of the appropriate "coexistence" between state and federal government in the labor field, this Court has thus focused on the substantive consistency of the state's action with the NLRA's policies and on the intrusive effect of the state's conduct on the regulatory scheme of the NLRA. The importance of these factors arises from the preemption doctrine's goal of "avoid[ing] conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971). To constitute "conflicting regulation," the challenged state law must have more than an indirect effect on labor relations. Rather, it must confound the national labor policy or interfere with the NLRB's administration of that policy.

To be sure, the instant case involves state laws that may have a remote and indirect effect on an employer's conduct that is subject to NLRB regulation, but the laws are not directed at regulating that conduct. Regulation of the labor field is left to the NLRB, where it belongs. Wisconsin's actions, which occur *after* the NLRB has made determinations on the merits of labor disputes,

involve the state only as a consumer and the subject business only as a seller of products.[13]

C. The Court of Appeals Misapplied the *Garmon* Preemption Rule.

In the present case, the state and federal policies are entirely compatible. The state's concurrent jurisdiction does not afford an alternative remedy to that available through the NLRB. There is no procedural duplication from the federal to the state level. Wisconsin does not second-guess the NLRB; on the contrary, Wisconsin's actions lend credence to NLRB decisions that are also found worthy of judicial enforcement. There is no chance that conflicting state laws will emerge to displace a uniform national law on the issue of unfair labor practices. Wisconsin's actions do not interfere with the national labor policy; they do not upset the collective bargaining relationship; and they do not interfere with the NLRB's administration of the national labor policy.

Further, the court of appeals' focus on the "punitive" character of the Wisconsin laws is misplaced. The statutes do not punish; they seek to allocate Wisconsin public revenues in a manner consistent with the national labor policy, leaving recidivist labor law violators to do business elsewhere. To call such public enactments "puni-

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[13] In *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 104 S.Ct. 2610 (1984), the Court rejected a preemption challenge to a state eminent domain statute based on the Staggers Rail Act amendments to the Interstate Commerce Act. The Court described the purpose of the Staggers provision as "to abbreviate the period during which a carrier is obligated to furnish financially-burdensome service it seeks to escape through abandonment." *Id.* at 2618. The Court reasoned:

> State condemnation proceedings do not interfere with that purpose insofar as such proceedings *follow* abandonment. . . . Nothing in [Staggers] indicates a federal interest in affording special protection to a carrier after the point at which the carrier's federal obligation ends.

Id. (emphasis in original). Similarly, nothing in the NLRA indicates a federal interest precluding the affirmative use by states of federal actions in the implementation of state policies.

tive" is to deny the dynamic nature of the national and international economies in which companies like Gould operate.[14]

Because the state's actions and the statutes upon which they are based are consistent with the policies of the NLRA, do not interfere with the NLRB, and are generated out of a strong local interest, the Court should recognize that permitting these statutes to stand will not be contrary to the principles of national uniformity and administrative consistency that underlie *Garmon* preemption.

CONCLUSION

For all these reasons, the judgment of the court of appeals as it relates to the preemption issue should be reversed.

Respectfully submitted,

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[14] In its Motion to Affirm, Gould argues that since Congress allegedly "considered and *rejected* debarment as a means of regulating NLRA conduct" (page 1; emphasis in original), Wisconsin is preempted from adopting a similar measure. However, as this Court stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969), "unsuccessful attempts at legislation are not the best of guides to legislative intent." Moreover, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980) (citation omitted). A more reasonable inference—to the extent that *any* inference from Congress' inaction is reasonable—is that Congress' failure to deal with recidivism in the NLRA leaves that subject matter to the states.

APPENDIX

APPENDIX

Wis. Stat. Ann. § 16.75 (8) (West Supp. 1984). The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency. Each waiver shall be entered on the record specified in sub. (1).

Wis. Stat. Ann. § 101.245 (West Supp. 1984). Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, 29 USC 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75 (8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (i) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.